IN THE

Supreme Court of the United States

October Term, 1957.

No. 107.

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, et al.,

Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, Also Known as DOROTHY B. STEWART, etc.,

Appellees.

BRIEF OF APPELLANTS.

WILLIAM H. FOULK,
229 Delaware Trust Bldg.,
Wilmington 1, Delaware,
MANLEY P. CALDWELL,
CALDWELL, PACETTI, ROBINSON & FOSTER,
501 Harvey Building,
West Palm Beach, Florida,
Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Appellants.

Of Counsel:
EDWARD MCCARTHY,
MCCARTHY, LANE & ADAMS,
423 Atlantic National Bank Bldg.,
Jacksonville, Florida,
Attorney for Elizabeth Donner Hanson, as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.

TABLE OF CASES CITED.

TABLE OF STATUTES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

October Term, 1957.

No. 107.

ELIZABETH DONNER HANSON, INDIVIDUALLY, AS EXECUTRIX OF THE WILL OF DORA BROWNING DONNER, DECEASED, ET AL.,

Appellants,

v.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, AND ELWYN L. MIDDLETON, AS GUARDIAN OF THE PROPERTY OF DOROTHY BROWNING STEWART, ETC.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF APPELLANTS.

OPINIONS BELOW.

The opinion of the Supreme Court of Florida has not been reported either officially or unofficially. It is printed in the Record (R. 181-192). The opinion of the Circuit Court of Palm Beach County, which is affirmed in part and reversed in part by the Supreme Court is not reported. It is printed in the Record (R. 110).

JURISDICTION.

The primary ground for this appeal is lack of jurisdiction of the Florida Court.

Appellants raised this question (a) by their first motion filed in this action in the Circuit Court of Palm Beach County, (b) in their certiorari to the Supreme Court of Florida from the order of said Court postponing determination of the question, (c) in their motion to stay the action in the Circuit Court pending determination of the same questions in an action in the Court of Chancery of the State of Delaware, (d) in their certiorari to the Florida Supreme Court from the order denying the stay, (e) in their answer to the complaint in the Circuit Court, (f) in their briefs and arguments to the Florida Supreme Court, and (g) in their petition and extraordinary petition for rehearing in the Florida Supreme Court as more particularly set forth in their Statement of the Case (p. 7). Appellants' further grounds for review are the failure of the Florida Courts (1) to apply Delaware law in passing upon the validity of a Delaware trust, (2) to give full faith and credit to the judgments of the Delaware Courts determining the validity of the trust, and (3) to grant comity to the enforceable judgments of the Delaware Courts which by their terms prevent enforcement of their (the Florida Courts') judgments.

The judgment of the Supreme Court of Florida was entered on September 19, 1956 (R. 182). Its order denying Appellants' petition for rehearing was entered on November 28, 1956 (R. 204). Appellants' notice of appeal to this Court was filed in the Supreme Court of Florida on February 21, 1957 (R. 234). This Court, by order dated June 17, 1957, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits and consolidated this case with the case of *Lewis, et al. v. Hanson*, No. 977 October Term, 1956 (R. 238) in which this Court granted certiorari to a judgment of the Supreme Court of the State of Delaware determining that the trust involved in this case is valid and enforceable.

The judgment of the Supreme Court of Florida dated September 19, 1956, as finalized by its denial of Appellants' petition for rehearing on November 28, 1956, was a final judgment by the highest court of that State. Jurisdiction of this Court to review the judgment on appeal is conferred by 62 Stat. 929, 28 U. S. C. Sec. 1257 (2). *Dahnke-Walker Milling Company v. Bondurant*, (1921) 257 U. S. 282. This Court may also review the judgment by granting certiorari under 62 Stat. 962, 28 U. S. C. Sec. 2103.

STATUTE INVOLVED.

The full text of the Statute of the State of Florida (Chap. 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233), the validity of which is involved in this appeal, is:

48.01. *Service of process by publication, in what cases.*

Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in 48.02 in any suit or proceeding:

(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(2) To quiet title or remove any encumbrance, lien or cloud upon the title to any real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(3) For the partition of real or personal property within the jurisdiction of the court;

(4) For divorce or annulment of marriage;

(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder.

(6) For the reestablishment of lost instruments or records which have or should have their situs within the jurisdiction of the court;

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ or process shall have been issued and executed so as to place any property, fund or indebtedness in custodia legis;

(9) In scire facias to revive a judgment;

(10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.

48.02. *Service of process by publication, upon whom.*

Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

(1) Any known or unknown natural person, and, when described as such, the unknown spouse, heirs, devisees, grantees, creditors or other parties claiming by, through, under or against any known or unknown person who is known to be dead or is not known to be either dead or alive;

(2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown, and whether dissolved or existing, including corporations or other legal entities not known to be dissolved or existing, and, when described as such, the unknown assigns, successors in interest, trustees, or any other party claiming by, through, under or against any named corporation or legal entity;

(3) Any group, firm, entity or persons who operate or do business, or have operated or done business, in this state, under a name or title which includes the word "corporation," "company," "incorporated," "inc." or any combination thereof, or under a name or title which indicates, tends to indicate or leads one to think that the same may be a corporation or other legal entity; and

(4) All claimants under any of such parties. Unknown parties may be proceeded against exclusively or together with other parties.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(i) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of a trustee who was not personally served with process, who has not appeared in the proceedings and who has no place of business, has never conducted business and has no officers, agents or representatives in the State of Florida?

(ii) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear* and *unambiguous* will, for the sole purpose of declaring invalid an *inter vivos* trust whose situs, property and trustee were all outside the jurisdiction of the Court and whose trustee was not personally served with process and did not appear in the proceedings?

(iii) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(iv) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(v) Did the Supreme Court of Florida err in holding that the *inter vivos* trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(vi) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandates of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

STATEMENT OF THE CASE.

This action was brough for the purpose of determining the validity of the exercise of a power of appointment reserved in an *inter vivos* trust created in Delaware by agreement dated March 25, 1935, between Dora Browning Donner, then a resident of the State of Pennsylvania, and Wilmington Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, as Trustee (R. 17). On December 3, 1949, after Mrs. Donner had moved to and become a resident of the State of Florida, she executed (and later amended under date of July 5, 1950) her reserved power of appointment (R. 31), appointing the trust funds as follows: $200,000 to each of two trusts for the benefit of Joseph Donner Winsor and Donner Hanson, two of the Appellants herein, of which Delaware Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington Delaware, is Trustee; $10,000 to the Bryn Mawr (Pennsylvania) Hospital; an aggregate of $7,000 to six employees (all non-residents of the State of Florida); and the residue to Elizabeth Donner Hanson, one of the Appellants herein, "as the Executrix of [her] Last Will and Testament to be dealt with by her in accordance with the terms and conditions of said Last Will and Testament * * *".

In her Will, executed on the same day as this power, after disposing of her tangible personal property and directing her Executrix to pay out of her estate "all estate, inheritance, transfer or other succession or death duties, State and Federal, which by reason of [her] death shall become payable upon or with respect to the property appointed by [her] by the exercise of the power of appointment provided in [her] favor in paragraph 1 of a certain trust agreement entered into between [her] and Wilmington Trust Company, a Delaware corporation, as Trustee on the 25th day of March, 1935", she bequeathed one-half of the remainder to Delaware Trust Company as Trustee under a third trust for the benefit of Katherine N. R. Denckla, one of the original Plaintiffs and an Appellee in this action, and the remaining one-half to Elizabeth Donner Hanson, as Trustee of a trust created by said Will for the benefit of Dorothy B. Rodgers Stewart, who through her guardian, Elwyn L. Middleton, is the remaining original Plaintiff and Appellee in this action (R. 12).

Mrs. Donner died on November 20, 1952, and her Will was probated in Palm Beach County, Florida (R. 5).

Wilmington Trust Company, in obedience to the direction of the power of appointment dated December 3, 1949 to pay over the trust fund "as soon as conveniently may be", between January 7, 1953 and February 11, 1953, paid Bryn Mawr Hospital the $10,000 appointed to it and the six employees the $7,000 appointed to them. On March 30, 1953, it delivered to Delaware Trust Company, Trustee of the two trusts for Joseph Donner Winsor and Donner Hanson, securities and cash in the amount of $200,000 for each trust (R. 105). Wilmington Trust Company continues to hold the residue of the trust estate for the account of the Executrix (R. 106). None of the trust assets have ever been in the State of Florida and neither of the Trust Companies has any office, officers, agents or representatives, or does any business, in that State (R. 102, 104, 106).

After this distribution and after the expiration of the time period within which the Trustee was ordered to make distribution, namely, "not later than twelve months after * * * [Mrs. Donner's] death" (November 20, 1953), Appellees on January 22, 1954 filed this action in the Circuit Court of Palm Beach County, for a determination and declaration "of what portion of the trust property * * * passes under the residuary clause of the will of the decedent". (R. 12). Appellants, all being residents of the State of Florida, were personally served with process and appeared herein through their attorneys (R. 37). Three of the servants who were appointed to and paid a portion of the trust fund were not named as defendants. The Trust Companies, the Bryn Mawr Hospital and the remaining three servants, all being non-residents, could not be personally served and did not appear. Jurisdiction over them was attempted by constructive service under the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02 (R. 39, 41).

Appellants filed a motion to dismiss the action on the grounds that the Circuit Court lacked jurisdiction over the subject matter of the action for the reasons, inter alia, (1) that none of the corporate defendants or trustees had offices, officers, agents or representatives, or did business, in the State of Florida and there was no res in the State of Florida which would constitute a legal basis for constructive service; (2) that the exercise of jurisdiction under the circumstances would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution; and (3) that the plaintiffs had failed to join and therefore the Court lacked jurisdiction over indispensable parties to the disposition of the suit (R. 40). After hearing, the Circuit Court on April 9, 1954, determined that:

> "Though this suit is primarily concerned with the validity and effect of certain powers of appointment

rather than the will, I am inclined to think that the matters sought to be presented by the motion filed February 18, 1954, can best be determined at final hearing." (R. 43)

Ruling was therefore postponed "*until trial and final hearing*".

Appellants petitioned the Supreme Court of Florida for certiorari (R. 125), which was denied by order dated July 1, 1954 (R. 47).

Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under Mrs. Donner's will, then filed an action in the Court of Chancery of the State of Delaware, impleading all interested parties and after reporting to that Court that the complaint in this action charged her with having "failed to take any steps" to "capture" the trust assets, prayed that the Court "determine by declaratory judgment the persons entitled to participate in the assets held in trust by the Wilmington Trust Company * * *" and "enter decrees awarding said funds to the persons entitled thereto" (R. 55).

Appellants then filed their answer in this action (R. 48) appending a copy of the Delaware complaint and reporting to the Circuit Court of Palm Beach County that "intending to meet Plaintiffs' charge that [the Executrix] has failed to take steps to 'capture' assets belonging to said Estate and in order to expedite the final determination of the controversy raised by plaintiffs [she had] on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware, * * * a complaint for declaratory judgment against Wilmington Trust Company as Trustee, the Plaintiffs in this suit and others, asking the Court to determine the parties entitled to participate in the assets held in trust by Wilmington Trust Company * * *." Appellants' answer avers that the Delaware Court "is the only Court (1) having jurisdiction of the aforesaid trust, the Trustee and the trust assets; (2) which can appropriately and finally

determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States" (R. 54). The answer renewed Appellants' charge that the Circuit Court of Palm Beach County lacked jurisdiction to finally determine the questions raised by the complaint and prayed that the proceedings be stayed pending the determination of the Delaware Court (R. 52, 53, 54).

On August 25, 1954, the Circuit Court of Palm Beach County denied Appellants' motion for a stay (R. 94) and Appellants again petitioned the Supreme Court of Florida for a writ of certiorari to review said action (R. 131). This was denied by order of that Court dated November 26, 1954 (R. 96).

Appellees and Appellants both filed motions for a Summary Final Decree on the record (R. 95, 97). Argument was heard by the Circuit Court of Palm Beach County on January 5, 1955, and on January 14, 1955, the Court filed its "Summary Final Decree" holding:

> "As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer * * *. Hence this Court considers that it has no jurisdiction over the non-answering defendants" (R. 110).

The Court thereupon dismissed the action as to the non-answering defendants, but proceeded to hold that "as to the parties now before the Court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and the Wilmington Trust Company, as Trustee, and additions thereto passed under the Will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of said will * * *" (R. 111).

Appellants petitioned for rehearing primarily on the ground that the Court having found that it lacked jurisdiction over the trustees and over the trust res was neces-

sarily prevented from finally and effectively determining the litigation (R. 112). This petition was denied by order of the Court dated March 3, 1955, after which both Appellants and Appellees appealed to the Supreme Court of Florida (R. 120).

On December 28, 1955, the Court of Chancery of the State of Delaware, after hearing the parties in the action pending before it, and after giving consideration to the proceedings and "Summary Final Decree" of the Circuit Court for Palm Beach County, ruled in an opinion:

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustee in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware". (R. 148) (119 A. 2d 907)

* * *

2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercise of the powers of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under the Agreement with Mrs. Donner." (R. 155) (119 A. 2d 911)

On January 13, 1955, the Delaware Court entered its final decree which by its terms binds all parties to the litigation, who include all parties to this action, to the declarations, adjudications and determinations thereof. (R. 156).

Appellants then on March 19, 1956 filed in the Supreme Court of Florida a petition requesting the Court to remand the action to the Circuit Court with instructions to dismiss upon the basis of the opinion and order of the Delaware Court, copies of which were attached (R. 135). Said petition recited that a petition for rehearing by certain of the defendants in the Delaware litigation urging that the

Court give full faith and credit to the "Summary Final Decree" of the Circuit Court of Palm Beach County had been denied after hearing.

Argument on the motion to remand was heard by the Supreme Court of Florida on March 27, 1956, at the same time as the hearing on the appeals.

On September 19, 1956, the Supreme Court of Florida filed its opinion denying said motion to remand and holding that the Circuit Court had jurisdiction of all of the defendants named in this action and that the appointments of the trust property were invalid although the trust itself was valid (R. 181).

Appellants filed a petition for rehearing particularly directing the Court's attention to the same questions presented by this appeal ~~as set forth in paragraph (e) hereof~~ (R. 193). This petition was denied on November 28, 1956 (R. 204) and on the same day the Court granted Appellants' petition to stay its mandate pending the completion of its appeal to this Court (R. 205).

On January 14, 1957, the Supreme Court of the State of Delaware (128 A. 2d 819) affirmed the Court of Chancery of that State (R. 209). A petition for reargument, or, in the alternative for a stay of the mandate of the Delaware Supreme Court to permit appellants to petition this Court for a writ of certiorari, was settled by order of that Court dated February 7, 1957, denying the reargument and granting the stay.

On January 25, 1957, Appellants filed with the Supreme Court of Florida a motion for leave to file an Extraordinary Petition for Rehearing, based on the final determination of the Delaware Supreme Court, attaching a copy of its opinion to the petition (R. 206, 207). The Supreme Court of Florida dismissed this motion by order dated February 18, 1957 (R. 233).

SUMMARY OF ARGUMENT.

Mrs. Donner, a citizen and resident of Pennsylvania, made a contract with Wilmington Trust Company, a corporation which confines its business activities to the State of its origin, Delaware. Under the terms of that contract, Mrs. Donner delivered property to the Trust Company in Delaware and it committed itself to manage and dispose of that property in accordance with the provisions of that contract. The Courts of the State of Florida cannot adjudicate the validity of that contract in the absence of service of legal process on the Trust Company or its voluntary appearance in an action brought for that purpose. Under the terms of that contract, third persons became entitled to beneficial interests on Mrs. Donner's death. These persons were non residents of the State of Florida and the Courts of that State cannot in the absence of legal service or appearance of those persons adjudicate their rights. An attempt by the Florida Court to determine the validity of Mrs. Donner's contract with the Trust Company with neither it nor the beneficiaries joined in the action violates the Due Process Clause of the Constitution of the United States. Mrs. Donner's contract with the Trust Company is a Delaware contract, completely executed, delivered, and administered in the State of Delaware; and its validity is determined by the law of Delaware. The Delaware Supreme Court has decreed that the contract is valid, and the Florida Courts are required by the Constitution of the United States to give full faith and credit to that determination.

ARGUMENT.

I.

The Application by the Florida Courts of the Provisions of Chapter 48, Florida Statutes, Section 48.01 and 48.02, as a Basis for Jurisdiction to Decree the Devolution of Property Outside Its Jurisdiction and in the Hands of a Trustee Who Was Not Personally Served With Process, Who Has Not Appeared in the Proceedings, and Who Has No Place of Business, Has Never Conducted Business and Who Has No Officers, Agents or Representatives in the State of Florida, Violates the Fourteenth Amendment of the Constitution of the United States.

A careful reading of Sections 48.01 and 48.02 of Chapter 48 of the Florida Statutes shows that the legislature in enacting those sections were fully conscious of the Constitutional limitations inherent in such legislation. Paragraphs (1), (2), (3) and (6) are specifically limited to problems arising out of real and personal property "within the jurisdiction of the Court" or debts or obligations "owing by any party upon whom process can be served within this State." Similarly, paragraphs (7), (8) and (9) have to do with execution process within the State. We submit that the provisions of paragraphs (4), (5) and (10) are similarly restricted to property physically in the State or in the hands of a person upon whom process can be served within the State. This Court has settled this point with regard to paragraph (4) which permits service by publication in suits "for divorce or annulment of marriage" in *Armstrong v. Armstrong*, (1956) 350 U. S. 568. In that case, the Florida Court with only service by publication on the nonresident defendant wife, presumed to decree that she was not only not entitled to alimony but that she must return certain stock certificates located in Ohio. In a separate concurring opinion by Mr. Justice Black, in which

the Chief Justice and Justices Douglas and Clark joined, it was stated:

> "We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the absence of power in the Florida Court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party."

Paragraph (5) which covers suits "for the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder", must be similarly circumscribed to property within the jurisdiction of the Court or in the hands of a person who can be served with process in the State. Consequently, it becomes obvious that when the Florida Court reaches out for property and persons beyond the boundaries of its State, it offends due process. But the Florida Supreme Court, in its opinion, says:

> "The Complaint for declaratory judgment in this case was filed for the purpose of determining what passes under the residuary clause of the will * * *." (R. 183)

It then concluded, without rationalizing:

> "Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary State." (R. 185)

A few homely examples are sufficient to show the fallacy of this conclusion. Suppose a testator who has worked in New York retires to Florida, dies, and in his will, probated in Florida, provides: "I give and bequeath to my

nephew the proceeds of my retirement pension agreement with the Generous Company, whose sole office and place of business is in New York City.'' Would the Florida Court claim the right to determine a dispute over the amount due under this contract merely because it was mentioned in the Will, without personal service upon, or appearance by, the company? Or would the Florida Court undertake the determination of a wrongful death action covering an accident inflicted outside the State by a nonresident tortfeasor merely because a recovery would pass under the residuary clause of the decedent's will?

The Florida Supreme Court undoubtedly realized the fallacy of its position and attempted to strengthen it by an equally fallacious theory. It said:

> ''We do not question the validity of the beneficial life estate reserved by the settlor.'' R. 186) [1]
>
> * * *
>
> ''It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish *remainder interests* under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment, as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida''. (R. 187)

So, the Florida Supreme Court leaves its wholly nonexistent jurdisdictional base of interpreting a will (which is not only not ambiguous but crystal clear in its meaning) for the equally untenable base of construing its newly-created Florida contract without properly bringing in the other contracting party, namely, the Wilmington Trust Company. And, in the performance of this judicial legerdemain, it had to find the contract valid and republished in order to finally destroy it.

---

1. Appellees also admit that the trust was valid insofar as the life estate was concerned (R. 201).

(a) The Wilmington Trust Company, the trustee, is an indispensable party.

The Circuit Court of Palm Beach County properly held that it had "no jurisdiction over the non-answering defendants", namely, the Trustee and the nonresident beneficiaries and dismissed the action as to them (R. 110, 111). Neither it nor the Supreme Court were willing to come to grips with the question of the absence of indispensable parties. The Circuit Court dismissed Appellant's Petition for Rehearing (R. 112) which directly raised the question, without hearing argument and without comment (R. 120). The Supreme Court contented itself with the conclusions that it had jurisdiction under either the interpretation of a will or the determination of the validity of a contract giving as its only excuse for the absence of the indispensable parties its decision in the case of *Henderson v. Usher,* (1935) 118 Fla. 688, 160 So. 9, saying:

> "In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust 'res', consisting entirely of intangible personalty, was physically located in New York and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that State of the record because substantive jurisdiction existed in the Florida Court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida." (R. 191)

With all deference to the Florida Supreme Court's interpretation of its own decision, Appellants pointed out in their petition for rehearing that in the *Henderson* case the trustees voluntarily appeared and submitted themselves to the jurisdiction of the Court, so that the propriety of constructive service was moot (R. 196). The Court noted this, after discussing *Lines v. Lines,* (Pa. 1891) 21 Atl. 809, which held that "a court of equity in this State [Pennsyl-

vania] cannot by its decree take [property] out of the hands of its custodian there [New York] and transfer it to executors in this State", and *Martin v. Martin,* (Pa. 1906) 63 Atl. 1026, which made a similar conclusion, saying:

> "* * * While *here the trustees come into court* seeking advice as to how they should proceed in the administration of the trust incident to its repudiation and election by the primary beneficiary to take a child's part. When they did this, our view is that they constructively brought the res into the Court." (Emphasis added.)

Appellants further pointed out that the case of *Swetland v. Swetland,* (N. J. Eq. 1930) 149 Atl. 50, 153 Atl. 907 upon which the Supreme Court had originally relied in the *Henderson* case (R. 186) and in reaffirming it in this case had been repudiated in *Cutts v. Najdowski,* (N. J. Eq. 1938) 198 Atl. 885 (R. 198). The Florida Supreme Court, without hearing argument, denied the petition for rehearing without comment (R. 204).[2]

The basic rules of jurisdiction are so well established in *Pennoyer v. Neff,* (1878) 95 U. S. 714, and the long line of authorities citing it that they scarcely need repeating. For the purpose of this argument, Appellant feels justified in citing the secondary authority, 30 C. J. S. 437, as succinctly stating these rules:

> "An equity court has no cognizance of a suit in which its decree would be ineffectual because of territorial limits to the reach of its process. No jurisdiction exists unless the parties to be affected are subject to the Court's control, or the res is within the jurisdiction; the Court has jurisdiction whenever the presence of the parties, the res, or a portion of the res within its jurisdiction enables it to make and enforce a just decree."

---

2. The Delaware Supreme Court found that neither the Henderson nor Swetland cases were apposite authorities to this case (R. 226).

An analysis of the above in the light of the facts of this case discloses that the Court cannot compel Wilmington Trust Company, the trustee, to take action and it cannot appoint a receiver for the trust assets in Delaware to carry out its mandate. The most that it can do is direct the Executrix to bring suit against the Trustee in Delaware for the recovery of the trust assets. This she has done without success, so that any decree of the Florida Courts, in the absence of a trustee and the res, would be a futility.

This Court held that a trustee was a necessary party to an action testing the validity of a trust in *McArthur v. Scott*, (1885) 113 U. S. 340, 396, saying;

> "A trustee who has large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit brought by a stranger to defeat the trust, and often sufficiently represents the beneficiaries."

The Florida Supreme Court made a similar finding in *Wilson v. Russ*, (1880) 17 Fla. 691:

> "A trustee in whom is vested the legal estate is a necessary party in all proceedings affecting the trust."[3]

The Supreme Judicial Court of Massachusetts reached the same conclusion in *Sadler v. Industrial Trust Company*, (1951) 97 N. E. 2d 169, in which the facts were remarkably similar to those in this case:

> "The trusts were executed in Rhode Island, and consist entirely of personal property, which was transferred to the trustee by the settlor at the times the trusts were executed. The trustee is a Rhode Island banking corporation with its place of business in Providence in that State, and the trusts were administered entirely in that State. The situs of the trusts is in Rhode Island, where are found the trustee and the

3 See also: *Winn v. Strickland*, (Fla. 1894) 16 So. 606.

trust property, notwithstanding the residence of the beneficiaries in this Commonwealth, and notwithstanding the former residence here of the settlor. * * * *The trustee is accountable only in Rhode Island.* * * * The decree describes the trustee as a necessary party. It is at least that. * * *

"In our opinion, the trustee is an indispensable party to any adjudication of the life beneficiary's interests under the trust. *Justice requires that the trustee be bound by the declaration and not left free to raise the same question, for example, in an accounting with the same parties at a later date.* * * *.

"No jurisdiction to enter a decree in personam against the trustee was acquired by service by registered mail and application. (Citing *Pennoyer v. Neff*, supra.)" (Emphasis supplied.)

The Supreme Court of the State of Delaware in its opinion in the companion case (No. 977 October 1956) said:

"A trustee is also an indispensable party to a suit involving trust property, and in defense of title to the trust property." (128 A. 2d 834) (R. 230.)

(b) The parties appointed as beneficiaries of the trust are indispensable parties.

Delaware Trust Company, which was appointed to and received $400,000 of the trust assets as Trustee of two trusts, Bryn Mawr Hospital, appointee of $10,000, and three servants, who received a total of $4,000, are all nonresidents of the State of Florida, and none of them was personally served or appeared (R. 55-62). Three other servants, who received a total of $3,000, were not even named as parties. In the absence of these corporations and parties, the Florida Courts are powerless to give a final and binding decree affecting their interests, particularly in the absence of the Wilmington Trust Company, the Trustee.

This rule was aptly stated by the Supreme Judicial Court of Massachusetts in *Gulda v. Second National Bank*, (1948) 80 N. E. 2d 12, 15 A. L. R. 2d 605, 608, where the trustee was subject to the Court's jurisdiction, but all of the beneficiaries were not.

> "In the instant case, however, the very existence of the trust itself * * * is threatened by the plaintiff, and those named as beneficiaries in the said declaration may be adversely and directly affected by the decree which may be entered. Their interests in the property are opposed to those asserted by the plaintiff. They are entitled to be heard in order to protect their rights and should not be compelled to depend on the defense made by the trustee."

(c) There was no res in Florida which could be used as the basis for constructive service.

None of the trust assets have ever been in Florida (R. 106). In their petition for rehearing (R. 193) appellants directed the attention of the Florida Supreme Court to the case of *Findlay v. F. E. C. Railway Company*, (D. C. Fla. 1933) 3 F. Supp. 393, *aff'd.* (C. A. 5) 68 Fed. 2d 540, holding that the Court could not construe the will of a Florida resident where the property was held outside the State by nonresident trustees in the absence of personal service or appearance of the trustees:

> "This Court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other nonresident beneficiaries under the will. Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs bonds, through the trust deed, are a lien upon it, there being no res in this jurisdiction, there is no basis upon which this court may

properly direct the conduct of the nonresident trustees with respect to the trust estate. Any attempt to do so would be a pure usurpation of power." (R. 195)

The Supreme Court of the State of Delaware made the same ruling in the companion case:

"* * * To hold that in the absence of jurisdiction over the *res* in controversy, Florida can compel appearance through substitute service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (R. 230, 128 A. 2d 834)."

Finally appellants submit that the Florida Courts were clearly without jurisdiction and that this Court should accept jurisdiction of this appeal and should reverse the Florida Supreme Court and remand with directions to dismiss with costs to appellants.

II.

The Florida Courts Must Give Full Faith and Credit to the Judgments of the Delaware Chancery and Supreme Courts.

If this Court should determine that the Florida Courts have jurisdiction in this action, then appellants submit that this Court should grant certiorari and should find that the Florida Courts are bound by the judgments of the Delaware Courts: Appellant, Elizabeth Donner Hanson, the Executrix, in an effort to bring about a speedy conclusion of the dispute instigated by the filing of this action, impleaded all of the interested parties in an action in the Court of Chancery of the State of Delaware where the trustee, the trust res, and the major beneficiaries were located, and where the decree of the Court would be final and binding on the trustee and all of the parties (R. 53). The Court of Chancery and the Supreme Court of the State of Delaware held the trust valid and the delivery of the assets to the

appointed beneficiaries a lawful exercise by the trustee of its duties and obligations under the trust agreement.

In *Roche v. McDonald*, (1928) 275 U. S. 449, this Court said at page 451:

> "It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that the judgment of a State court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that State can be relied on in the courts of any other State."

Appellants again direct the Court's attention to the fact that the trust res and trustee were both present in Delaware and absent in Florida and that the Delaware Courts are the only courts which can render a final and binding decree. No court but a Delaware court can render an *in personam* judgment against Wilmington Trust Company, the Trustee, absent its voluntary appearance before it.

The Supreme Court of the State of Delaware, in the companion case (No. 977, Oct. 1957, R. 225, 128 A. 2d 819, 831) so held, saying:

> "The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process; nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability."

This holding follows the teaching of this Court in *Baker v. Baker, Eccles & Co.*, (1916) 242 U. S. 394, 401, where it was said:

> "But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."[4]

Likewise, no court but the Delaware Court can render an in rem judgment, since the Delaware Court is the only court having jurisdiction of the res.

This Court so found in the case of *Riley v. New York Trust Co.*, (1942) 315 U. S. 343, 353:

> "While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is in rem; so far as it affects personalty beyond the state, it is in personam and can bind only parties thereto or their privies. This is the result of the ruling in Baker v. Baker, Eccles & Co., 242 U. S. 394, 400. Phrased somewhat differently, if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process."

By analogy, the Florida Courts must give full faith and credit to the judgments of the Delaware Courts dealing with assets within their jurisdiction.

---

4. See also: *International Shoe Co. v. Washington*, (1945) 326 U. S. 310, 316; *May v. Anderson*, (1953) 345 U. S. 528; *Armstrong v. Armstrong, supra.*

III.

The Florida Courts in Failing to Apply Delaware Law in the Determination of the Validity of a Delaware Trust Denied Due Process.

The inherent vice of the decisions of the Florida Courts is found in their unwillingness to admit that the only issue in this action is the determination of the validity of a Delaware trust. The will needs no interpretation. The Circuit Court made no effort to interpret it, but boldly proceeded to determine the validity of the powers appointing the property in the trust, justifying its action on the ground that some of the beneficiaries had been personally served and were subject to the Court's jurisdiction (R. 110). The Florida Supreme Court begs the question by saying:

> "* * * This determination [of what passes under the residuary clause of the will] requires a study of the trust instrument of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were 'effectively exercised' under the terms of the will. * * *" (R. 183)

It then concludes:

> "* * * This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein." (R. 185)

Appellants have demonstrated herein (pp. 16, 17) that the mere mention of the trust in the will does not give the Florida Courts the right to determine its validity absent the trustee and the trust res. We suggest in passing that if the Florida Court means that the reference to the trust results in its incorporation by reference in the will as a basis for construction, then the appointments as a part of a valid will become valid testamentary dispositions and their validity as a part of the inter vivos trust need not be

decided. *McHardy v. McHardy*, (1857) 7 Fla. 301. We have also pointed out that the Florida Supreme Court has admitted the validity of the trust insofar as the life estate is concerned (R. 186). This valid trust antedated the will and must be construed by the application of Delaware law, and since under Delaware law the powers of appointment merely filled in blanks and became a part of the original trust, they must also be construed by that law. *Wilmington Trust Co. v. Wilmington Trust Co.*, (Del. Supreme Ct. 1942) 24 A. 2d 309, 312, 139 A. L. R. 1117.

The Supreme Court of the State of Delaware found in the companion case:

> "* * * We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law." (R. 231, 128 A.2d 835)

In reaching this conclusion, the Supreme Court followed its earlier ruling in *Wilmington Trust Co. v. Wilmington Trust Co., supra*, in which it said:

> "* * * The validity of the deed of appointment and of the rights and interests assigned thereunder depend upon the law of the jurisdiction in which the trust had its seat when the power of appointment was exercised."

This rule is now practically universal in its application. The Restatement, Conflict of Laws, provides:

> "§ 294(2). The validity of a trust of choses in action created by a settlement or other transaction inter

vivos is determined by the law of the place where the transaction takes place."

"§ 299. The administration of a trust of movables is supervised by the courts of that state *only* in which the administration of the trust is located." (Emphasis supplied.)

As hereinbefore pointed out, the rule has now been changed in New Jersey from that applied in the *Swetland* case, *supra*, by the decision of *Cutts v. Najdowski, supra*, which held:

"The creation of an inter vivos trust in moneys or securities is governed by the laws of the situs of the moneys or securities."

The Supreme Judicial Court of Massachusetts reviews the recent cases in *National Shawmut Bank of Boston v. Cumming*, (1950) 91 N. E. 2d 337, 341:

"The elements entering into the decision as to the law of which State determines the validity of the trust are, on the one hand in Vermont, the settlor's domicil, and, on the other hand in Massachusetts, the presence of the property or its evidences, the completion of the trust agreement by final execution by the trustee, the domicil and the place of business of the trustee, and the settlor's intent that the trust should be administered by the trustee here. The general tendency of authorities elsewhere is away from the adoption of the law of the settlor's domicil where the property, the domicil and place of business of the trustee, and the place of administration intended by the settlor are in another State. (Citing authorities). The situation is unchanged by the fact that the one seeking to set aside the transaction is the widow of the settlor. (Citing cases). We are of opinion that the question of validity is to be determined by the law of this Commonwealth."

The Court of Appeals for the Fifth Circuit reached a similar conclusion in *Warner v. Florida Bank and Trust Co.*, (1947) 160 F. 2d 766, 771:

> "The validity of a trust of securities, including shares of stock, is governed by the law of the situs of the securities or the law of the place of the transaction. Matters of administration are determined by the law of the situs or the seat of the trust, and the domicile of the trustee of intangible personal property including shares of stock is usually the seat of the trust."

It also ruled at page 772:

> "The fact, therefore, that under Florida law the trust agreement is presumptively void does not prevent a Florida court from applying the law of Minnesota, where the agreement was made and under which law the agreement is presumptively valid."

It is therefore clear that the Florida Supreme Court erred in applying new law created by it in determining the validity of the trust.

This Court has held that failure to apply the law of the situs of the contract is a denial of the due process guaranteed by the Fourteenth Amendment. In *Home Insurance Co. v. Dick*, (1930) 281 U. S. 397, 408, it found that the Texas courts erred in applying Texas law in determining the validity of a contract made in Mexico to be performed either there or in New York, saying:

> "All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material he

was physically present and acting in Mexico. Texas was therefore without power to affect the terms of the contracts so made."

The analogy of the facts in that case to those in this action is immediately apparent. Here the trust was executed in Delaware and it and the powers of appointment became effective upon delivery to the trustee in Delaware (R. 104). The complete administration of the trust including the delivery of the property to the appointees of the powers was in Delaware (R. 105). The fact that Mrs. Donner became a resident of Florida is not pertinent.

In the *Home Insurance* case, the appellee contended that this Court lacked jurisdiction of the action "because the errors assigned involve only questions of local laws and of conflict of laws," thereby bringing into focus the conclusion of this Court that due process is violated by failure of a State Court to apply the proper State law.

IV.

The Florida Supreme Court Erred in Reaching a Conclusion Which Is Totally Lacking in Comity and Is Unenforceable.

Appellants again direct this Court's attention to the fact that the trustee and the trust res are in Delaware. The Supreme Court of the State of Delaware has held the trust valid and has concluded:

> "* * * It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a State having at best only a shadowy pretense of jurisdiction. * * *"

Appellant Hanson, the executrix, was charged by the complaint in this action with a failure "to take any steps" to "capture assets" belonging to the estate (R. 11). She took the only step which she could to recover these assets

by bringing suit in the State where the assets were (R. 54) only to be charged with "bad faith" for doing what she was charged with not doing (R. 69). In fact, appellees charge that the—

> "* * * proceeding in Delaware was merely a sham and was filed by [her] in order to try to deprive the Florida Courts of jurisdiction and for the purpose of trying to lose said case in Delaware and then claim in the Florida Courts that she could not recover said trust assets. If she can lose the case in Delaware and win the case in Florida, then her two children will get the benefits of most of said trust assets instead of appellants. * * * This illustrates the inconsistent position which she occupies in the case and why she is not an impartial executrix and trustee and why she could not have initiated the Delaware case in 'good faith.'" (R. 175)

Appellants submit that there is no evidence in the record to justify such charges and that any inconsistencies in this action are those of the appellees. The implied charge of fraud on the Delaware Court may be an omen that appellees propose to bring a personal action against appellant Hanson to surcharge her for failure to do what she has in good faith attempted to do. Consequently, this Court in an effort to bring a conclusion to this litigation in the interest of justice should resolve this "headlong collision between the States" in appellants' favor.

CONCLUSION.

Appellants believe that they are entitled to the following relief:

(a) This Court should grant their appeal from the judgment of the Supreme Court of Florida dated September 19, 1956, and should reverse the same with directions to said Court to remand this action to the Circuit Court of

Palm Beach with an order to dismiss this action with costs to the appellants, or, in the alternative, that

(b) This Court should grant certiorari to the judgment of the Supreme Court of Florida dated September 19, 1956, and reverse the same, with directions to said Court to remand this action to the Circuit Court of Palm Beach County with an order to dismiss this action with costs to the appellants.

Respectfully submitted,

WILLIAM H. FOULK,
229 Delaware Trust Bldg.,
Wilmington 1, Delaware,

MANLEY P. CALDWELL,
CALDWELL, PACETTI, ROBINSON & FOSTER,
501 Harvey Building,
West Palm Beach, Florida,

Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt,
Appellants.

Of Counsel:
EDWARD MCCARTHY,
MCCARTHY, LANE & ADAMS,
423 Atlantic National Bank Bldg.,
Jacksonville, Florida,
Attorney for Elizabeth Donner Hanson as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.